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No. 475

In the

Supreme Court of the United States

OCTOBER TERM, 1966

JOHN H. KELSEY, et al.,

Appellants,

v.

PERRY H. CORBETT, et al.,

Appellees.

Appeal From The Court Of Civil Appeals For The Eighth Supreme Judicial District Of Texas (El Paso)

STATEMENT OF JURISDICTION

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For The Eighth Supreme Judicial District
Of Texas (El Paso)

STATEMENT OF JURISDICTION

To Said Honorable Court:

John H. Kelsey, John M. Hills, William Y. Penn, U. S. M. Oil Company, Joseph I. O'Neill, Jr., Midwest Oil Corporation, W. S. Montgomery and The Atlantic Refining Company in this appeal to this Court against Perry H. Corbett, J. Folse Roy, W. L. Norman, Pecos County Water Control and Improvement District No. 2, Southwestern Foundation, Inc., and Dan L. Crump, Tax Assessor-Collector, present the

following Statement of Jurisdiction in compliance with Rule 15 of the Rules of Practice in this Court.

A. The opinion of the Court below is not officially reported; it is unofficially reported in 396 S.W. 2d 440; a full and complete copy of the opinion appears as Appendix A.

B. Jurisdiction in this Court is based on the following:

(1) Appellants, as Plaintiffs, brought suit against Appellees, as Defendants, in the District Court of Pecos County, Texas, 112th Judicial District; suit was for declaratory judgment pursuant to the Texas Declaratory Judgments Act[1] to the effect that Plaintiffs' real property interests were not subject to special ad valorem taxes to pay the interest and principal of certain purported bonds issued by an organization calling itself Pecos County Water Control and Improvement District No. 2 (Tr. 17, 42). The Defendants were Dan L. Crump, the County Tax Assessor-Collector, and certain individuals and entities in some way connected with the venture, either as issuers, brokers, or holders of the bond-like instruments in question (Tr. 17, 42). Trial was to a jury, at the conclusion of which the Court, over the objection of Appellants (Plaintiffs), instructed the jury to render a verdict for Defendants and rendered judgment for Defendants (Tr. 110, 111). Plaintiffs appealed (Tr. .....), the judgment was affirmed (Appendix A). Motion for Rehearing was overruled (Appendix B), Application for Writ of Error to the Supreme Court of Texas was Refused, No Reversible Error (Appendix C), Motion for Rehearing on the application was denied (Appendix D). Hence, this Appeal (Appendix E).

(2) The judgment to be reviewed was entered by the State District Court on January 15, 1964, (Tr. ....) and affirmed by the Court of Civil Appeals October 13, 1965;

[1] Acts 1943, 48th Legislature, p. 265, Ch. 164, Vernon's Annotated Texas Statutes, Article 2525-1.

Motion for Rehearing was overruled November 17, 1965; Application for Writ of Error was Refused, No Reversible Error, February 6, 1966; Motion for Rehearing on Application was denied March 30, 1966. (Appendices A, B, C & D)

(3) This Court has jurisdiction under United States Code, Title 28, Section 1257 (2) and (3).

(4) Appellants believe that the cases of *United States v. Mensevich*, 264 U.S. 134, 44 S. Ct. 282, and *Hamilton v. Regents of the University of California*, 293 U.S. 245, 55 S. Ct. 197, support this Court's jurisdiction in this case.

The complaint here is that the State Statute (Appendix F) is *void* which distinguishes it from those cases declining jurisdiction where only interpretation of construction is involved.

Further, the fact that the statute in question is a special act does not remove it from this Court's jurisdiction. *Hamilton v. Regents of the University of California*, 293 U.S. 245, 55 S. Ct. 197. In fact such special validating acts are so numerous and frequent that they have become a habit with the Texas legislature.[2] Thus, the basis of the attack on the State Statute has to do with its *validity*, and presents a problem which is general throughout the State, and indeed the nation. (See Appendix G). The legal and constitutional problems presented are *basic*. This Court carries a tradition, from which it has not deviated that special assessments for the benefit of private individuals, without benefit to the property owner assessed, violate the due process requirements of the United States Constitution, Amendments, Article XIV, Section 1. See *Village of Norwood v. Baker*, 172 U.S. 269, 19 S. Ct. 187.

(5) This appeal attacks the validity as repugnant to the U. S. Constitution of a Special Act of the Legislature

[2] See Vernon's Annotated Texas Statutes Art. 7880-147 w(1), 147c(9), 147c(10), 147z(2), 147z(3), 147z(4), 147z(5), 147z(6) and footnotes to Art. 7880-1.

of Texas, being Acts, 56th Legislature, First Called Session, Chapter 16, page 39, entitled "An Act Validating Pecos County Water Control and Improvement District No. 2". The Act in its entirety is set out as Appendix G.

C. The questions presented by the appeal are:

(1) Whether the Legislature of Texas has authority to enact without notice or hearing a special act applicable only to and for the sole benefit of a single private individual to establish as against other private individuals or entities the validity of a debt in the form of a tax.

(2) Whether the Legislature of Texas has authority to enact without notice or hearing a special act applicable only to and for the sole benefit of a single private individual the purpose and effect of which is to convert the tax collecting officials of Pecos County, Texas, into unpaid collection agents for the use of the private individual with no compensation to the officials, or the County, and with no public interest involved.

(3) Whether the Legislature of Texas has authority by special act passed without notice for the sole use of a single private individual to impress a debt and lien on the property of other private individuals or entities, which debt and lien exceeded the income producing character of the property.

(4) Whether the Court below erred in rendering judgment that Appellants' property *was* subject to tax and lien to pay the bonds and debts of Appellees, and in refusing to submit Appelllants requested Special Issue No. 28 (Tr. .....) as to whether the arrangement in question was a private financial venture (the proceeds of which would be subject to Federal income taxation) and not a public or municipal financial arrangement (which was or will be exempt from Federal income taxation—Internal Revenue Code Sec. 103).

D. (1) The factual background of the case is stated in Appellants' Application for Writ of Error to the Supreme Court of Texas as follows:

> "1. From June through September, 1955, some land speculators had prepared and completed a set or sets of papers purporting to show the creation, and organization of Pecos County Water Control and Improvement District No. 2, and purporting to show an election in said district to authorize the issuance of bonds in the total principal amount of $180,000.00, payable out of ad valorem taxes to be assessed on the real property within the district. These papers were presented to and passed by the Commissioners Court of Pecos County, Texas, and later the State Board of Water Engineers and the Attorney General of Texas.
>
> "2. At the time these papers were prepared, completed and presented, a New Mexico corporation called St. Michael's College Foundation (the name of which was later changed to Southwest Foundation, Inc.) was the sole owner of the entire surface interest in a portion of the land to be included in, and later actually included in, the proposed water control and improvement district. Specifically, the Foundation owned that portion of the property referred to in the record as the Santa Rosa Ranch, and shown as the Brown Area on the map which is in evidence as Defendants' Exhibit 1 and which has been transmitted with the record. Later, by a deed dated May 21, 1955, but not acknowledged until August 10, 1955, and not filed for record until August 15, 1955, after most of the proceedings had been completed, the Foundation acquired the entire surface interest in the remaining portion of the land to be included in the proposed district, this being the Imperial Ranch, or the Green Area shown on the map (S.F. 59-62). In short, the St. Michael's College Foundation, a New Mexico corporation, was the only signer of the papers comprising these purported proceedings which had any interest in any of the property to be

included in the proposed district, and the other persons who signed these proceedings did not own any interest in surface or minerals in the area to be included in the district.

"3. In October, 1955, by various conveyances, Midwest Oil Corporation, Joseph I. O'Neill, Jr., John M. Kelsey, William Y. Penn and others became the owners of oil and gas leasehold estates and overriding royalty interests under oil and gas leases executed by Edward Dickinson II, the owner of the minerals in a portion of the land in the so-called Imperial Ranch, being the Green Area shown on the map in evidence as Defendants' Exhibit 1. The mineral interest of Edward Dickinson has since been conveyed to U. S. M. Oil Company, a corporation owned or controlled by him. In other words, except for the Dickinson-U. S. M. interest, none of the Petitioners had any property rights or interests anywhere in the purported district during the period from June to September, 1955, and during which the papers purporting to evidence the creation, and organization and authorization for issuance of bonds were prepared, completed, and submitted to the various governmental officials.

"4. During January, February and March of 1956 there were carried on and completed the negotiations for the issue, purchase and sale of the water district bonds. Actually, preliminary negotiations for the purchase of the bonds had been going on from time to time during the entire period from May of 1955. These negotiations finally *consummated in the purchase by* Perry H. Corbett of the entire issue or series of bonds for a discounted value of $174,041.92.

"5. The district never had any funds other than the proceeds of the single bond sale. These proceeds were rapidly dissipated by a gratuitous transfer to the St. Michael's College Foundation, the instigator and sole possible beneficiary of the district, and in an irrigation well drilling venture. The balance of the funds were

used to defray the expenses of the creation and organization proceedings, bond issue, and, as long as they lasted, were repaid to the bond purchaser in the form of interest installments.

"6. After the initial default in payment of interest on the bonds, and long after the purported district had ceased to function even in name, the bondholder Corbett and his representatives, realizing the illegality in the original creation and issuance of the bonds and attempted levy of taxes, undertook extensive curative efforts culminating in the passage of a special validating act, Acts 56th Legislature, First Called Session, Chapter XVI, page 39. Following and pursuant, to this enactment, and in October, 1961, Dan L. Crump, the tax assessor-collector of Pecos County, Texas, prepared and sent to Petitioners and others tax statements for ad valorem taxes for the year 1961 for payment of past due principal and interest on the purported water district bonds from and after 1958. This action by the tax assessor-collector, pursuant to the attempted legislative validation precipitated this litigation which was commenced on November 13, 1961."

(2) The Federal Constitutional questions on which the appeal is based were raised by Appellants at the stages of the proceedings as follows:

(a) Plaintiffs' Original Petition (Tr. .....).

(b) Plaintiffs' Second Amended Original Petition (Tr. .....), and Third Amended Original Petition (Tr. .....).

(c) Plaintiffs' Requested Special Issues (Tr. .....), Specifically Requested Issues 25, 26, 27, and 28 (Tr. .....).

(d) Plaintiffs' Motion for Instructed Verdict (Tr. .....), specifically Paragraphs 6 (Tr. .....) and 7 (Tr. .....).

(e) Plaintiffs' Motion for New Trial (Tr. .....), specifically Paragraphs 11, 12, and 18 (Tr. .....).

(f) Appellants' (Plaintiffs') Brief in the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas (El Paso), pages .....

(g) Appellants' (Plaintiffs') Application for Writ of Error to the Supreme Court of Texas (page .....).

E. The Federal questions presented are sufficiently substantial to warrant the attention of this Court because:

(1) The undisputed facts show on their face that there is not and never was and never could have been a bona fide intention to create a genuine public municipal corporation for the proper purposes set out in the Constitution and Laws of the State of Texas for the simple reason that at no material time were there any public, residents or inhabitants of the area involved whose interests could be served by creation of such a municipal corporation. All the land in the purported District was owned, actually or beneficially, by a single New Mexico corporation. Hence the entire venture was, of necessity, a scheme for *private* financing for the use of a single private owner, tailored into the form of a municipal corporation. There is a cry in the land, sometimes justified that, "The Government should get out of business." There is a reprise to that, here raised, that "Business should get out of Government." Presented here to this Court is a classic case of business and financial promoters with schemes of questionable practicality distorting the legitimate processes of government into their greedy financial finagling. This is only one case. To show the extent to which this practice has become a national social problem (perhaps "scandal" would be a better word), Appellants attach as Appendix G a photo copy of a recent article in the Wall Street Journal, which article speaks for itself. Certainly most of these special districts are intended to, and do, serve a legitimate public interest. But here is one, and how many more no man knoweth, which is simply a "front" for speculations

which will not stand the test and scrutiny of private banks and lending institutions. There should be a way of separating the chaff from the wheat so that the legitimate public interests will be served and sacred private property interests will be protected. This the Texas courts in their cavalier dismissal of Appellants' arguments, have failed even to attempt.

(2) The Texas courts have refused even to face, much less answer the questions of whether the proceeds of the bonds are revenues from private, rather than public, obligations. The tax consequences of this determination will be material to a nation seeking revenue for defense and welfare programs. As the matter now stands, the interest paid and to be paid on these so-called bonds is exempt from Federal income taxation. Internal Revenue Code, Sec. 103. A declaration by this Court in this case will give the Internal Revenue Service a substantial authority to inquire of this and other districts whether interest received from them is for a project of sufficient public importance to earn the tax exemption granted by the Internal Revenue Code.

It is no answer to say that these Appellants, as private litigants, have no "standing" to raise questions running between the Appellees and the Internal Revenue Service. In an attack by the Internal Revenue Service, the same argument would be made—that the municipal nature of the securities had been established in this case in which the Internal Revenue Service had no right to appear and did not do so. Appellants attach as Appendix I a copy of a letter which is being sent to the proper government officials. We have told the Internal Revenue Service and we are telling this Court; that is about all we can do. This Court has in prior decisions refused to permit grave social and constitutional abuses to go unmended because of abstruse arguments of "standings"[3]. Hopefully, the Court will pursue this therapeutic program by entertaining the appeal in this case.

[3] Cf. Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663.

F. Alternatively, and if the appeal is improvidently taken, this Court has jurisdiction of the case as a Petition for Writ of Certiorari.

Respectfully submitted,

Boyd Laughlin

Boyd Laughlin

F. H. Pannill

F. H. Pannill

of Counsel

STUBBEMAN, MCRAE, SEALY & LAUGHLIN,
P. O. Box 670,
Midland, Texas,
Attorneys for Appellants.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Statement of Jurisdiction has this day been sent by United States mail, postage prepaid, to each opposing counsel, to-wit:

Mr. Robert B. Cox
Deaderick, McMahon & McKim
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P. O. Box 485
Odessa, Texas

Mr. Connell Ashley
P. O. Box 1552
Odessa, Texas

Mr. William L. Kerr
111 Midland Tower Building
Midland, Texas

Mr. Paul H. Dionne
P. O. Box 1687
Fort Stockton, Texas

Dated this 23 day of August, 1966.

F. H. Pannill

F. H. Pannill

APPENDIX A

JOHN H. KELSEY, et al.,

Appellants,

v.

PERRY H. CORBETT, et al.,

Appellees.

No. 5716.

Court of Civil Appeals of Texas,
El Paso.

October 13, 1965
Rehearing Denied November 17, 1965.

Suit by plaintiffs as taxpayers and taxable property owners within Pecos County Water Control and Improvement District No. 2 for a judgment declaring that neither the plaintiffs nor their property interests were subject to taxes levied and assessed for purpose of payment of bonds issued by the district. From a judgment of the District Court, Pecos County, C. E. Patterson, J., in favor of the defendants the plaintiffs appealed. The Court of Civil Appeals, Preslar, J., held that the plaintiffs had no cause of action since the matters sought to be litigated could be heard only in an election contest brought in time and manner provided by statutes.

Affirmed in part and reversed in part and rendered.

1. Declaratory Judgment

Suit for declaratory judgment that neither plaintiff taxpayers nor their property interests were subject to taxes levied and assessed for purpose of payment of bonds issued by county water control and improvement district on ground that there were no residents of district at time of election and those who voted in it were not qualified stated no cause of action since matter sought to be litigated could be heard only in an election contest brought in time and manner provided by statutes. V.A.T.S. Election Code, Arts. 9.01-9.38, 9.36.

2. Quo Warranto

Proceedings for formation of county water control and improvement district being in all things regular on their face, and it having operated as a corporation under such proceedings, only the state can question its existence.

3. Costs

In action by taxpayers for declaratory judgment that neither plaintiffs nor their property were subject to taxes levied for payment of bonds issued by county water control and improvement district, allowing county attorney attorney's fees for representing tax assessor-collector of county and taxing such fees as cost of court against plaintiffs was error since the tax assessor-collector was not in true position of a stakeholder but was in fact a party defendant.

Stubbeman, McRae, Sealy & Laughlin & F. H. Pannill, Midland, for appellants.

Deaderick, McMahon & McKim and Connell Ashley, Odessa, Kerr, FitzGerald & Kerr, Midland, for appellees.

Gibson, Spence & Gibson, Austin, amicus curiae.

PRESLAR, Justice.

John H. Kelsey and others, tax-payers and taxable property owners within the District of Pecos County Water Control and Improvement District No. 2, appellants herein, brought this suit as plaintiffs, seeking a judgment declaring that neither the plaintiffs nor their property interests were subject to the ad valorem taxes levied and assessed for the purpose of payment of interest and principal, past and future, on bonds issued by such Improvement District. Named as defendants were Pecos County Water Control and Improvement District No. 2, Perry H. Corbett and J. Folse Roy, the original purchasers and present holders of the bonds, and Dan L. Crump, Tax Assessor and Collector for Pecos County, and others.

Pecos County Water Control and Improvement District No. 2 was formed by an election held in 1955, and it is conceded by all parties hereto that all proceedings relating to the formation of such District and the approval of its bonds are, on their face, letter-perfect. The plaintiff-appellants quite frankly concede in their brief in this court that their position is:

> "(a) There were no resident property taxpaying qualified voters who had rendered their property for taxes so as to be qualified to vote—in fact, there were no inhabitants at all in the area constituting the purported district;

"(b) The persons who did vote at the election to create a district and at the election to authorize the issuance of the bonds were imported from outside the district for the sole purpose of casting ballots at this fictitious election, and were neither residents of nor owners of property within the purported district, and

"(c) The defendants who are the original purchasers and present claimants of the bonds knew at all material times, and particularly at and prior to their purchase of the bonds that there were no resident property taxpaying qualified voters who had rendered their properties for taxes who did or could have voted at the elections and therefore knew, or were on notice, that the elections were fictitious."

Plaintiffs went to trial on their Third Amended Original Petition, all of which, except paragraph 2 thereof, they specifically dismissed with prejudice; and paragraph 2 simply adopted their Second Amended Original Petition; so that, in effect, they went to trial on their Second Amended Original Petition. An analysis of that petition shows that they allege only that there was (1) no such legal entity as Pecos County Water Control and Improvement District No. 2; and (2) that they, the plaintiffs, were not obligated to pay the bonds and their property not subject to them.

At the conclusion of all the evidence the trial court withdrew the case from the jury and rendered judgment contrary to the plaintiffs' position and upholding the validity of the District. In that action we think the trial court was correct for two reasons: first, that the plaintiffs' suit was, in essence, an election contest which they could not maintain in such a proceeding; and second, the plaintiffs could not ques-

tion the existence of the District, as quo warranto was the sole exclusive remedy.

[1] Plaintiffs sought to show that at the time the District was formed in 1955 there were no residents within the physical boundaries of the District, and that those who voted for the formation of the District and for the issuance of the bonds thereof were not property-owning residents of the District. As stated, an election was held, and such election proceedings were in all things valid on their face, and were approved by the Commissioners Court of Pecos County. In effect, plaintiffs are attacking the qualifications of those who voted in the election. This they seek to do by suit filed some six years after such election, and not in conformity with the Election Code. In all their contentions plaintiffs come back to this one proposition—that there were no residents of the District and those voted in it were not qualified, so that it can be said that that is the true basis of their lawsuit. Almost the same proposition was before the Commission of Appeals in Slater v. Ellis County Levee Improvement District No. 9, 120 Tex. 272, 36 S.W. 2d 1014, where the following question was certified to the court:

"First Question.

> "Did the trial court err in sustaining appellee's special exception to that portion of appellants' answer which set up the fact that no legal bond election was held in said district because the true facts, of which the commissioners court had actual knowledge, were that none of the parties who voted therein were property holders or qualified voters within said district, and because the judges and clerks who held said election were not qualified voters within said district?"

In answering the question the court said: "The remedy given by the statutes (articles 3041 to 3075) for contesting elections of this character for irregularities or fraud is exclusive of all others." (Citing numerous authorities). Such articles 3041 to 3075 were, in 1951, replaced by Articles 9.01 to 9.38 of the Election Code of the State of Texas, V.A.T.S. Article 9.36 of such Election Code provides:

> "* * * If no contest of said election is filed and prosecuted in the manner and within the time herein provided for, it shall be conclusively presumed that said election as held and the result thereof as declared are in all respects valid and binding upon all courts * * *."

The record in the case before us indicates that no election contest was filed in regard to this District. The matters sought to be litigated in this suit could be heard only in an election contest brought in the time and manner provided by the statutes.

[2] The proceedings for the formation of this District being in all things regular on their face, and it having operated as a corporation under such proceedings, only the State can now question its existence. Walling v. North Central Texas Municipal Water Authority, 162 Tex. 527, 348 S.W. 2d 532, is the latest pronouncement by our Supreme Court restating this rule of law:

> "* * * When a body has acted and has been dealt with as a corporation after attempting to comply with the requirements of a valid statute authorizing its creation as such, only the State may question its corporate existence on the ground that the law was not followed. La Salle County Water Improvement Dist. No. 1 v. Guinn, Tex. Civ. App., 40 S.W. 2d 892, wr. ref.; Kuhn

v. City of Yoakum, Tex. Com. App., 6 S.W. 2d 91; Bowen v. Board of School Trustees, Tex. Civ. App., 16 S.W. 2d 424 (no wr.)."

Clearly, plaintiffs sought to question the existence of Pecos County Water Control and Improvement District No. 2 and cannot, under the above authorities, do so; and the judgment of the trial court was in that respect correct.

[3] In its judgment the trial court allowed the County Attorney of Pecos County attorney's fees for representing the Tax Assessor-Collector of said County, and taxed such fees as costs of court against appellants. We see no basis for such allowance of attorney's fees, since the Tax Assessor-Collector was not in the true position of a stakeholder but was, in fact, a party defendant. Unless it can be said that the attorney's fees are due by some statute, there can be no basis for them, and we see no such statutory basis here. The contention seems to be that such fees were by stipulation or agreement, but we do not construe the stipulation to be that one party would pay the attorney's fees of his adversary. The propriety of such an arrangement would raise a serious question. We construe the stipulation to be that if, in fact, attorney's fees were allowable, the court could then decide the amount. That part of the judgment allowing such attorney's fees and taxing same as cost is reversed and here rendered.

All other assignments of error have been considered, are found to be without merit, and are accordingly overruled.

Except for the allowance of attorney's fees, the judgment of the trial court is in all things affirmed.

APPENDIX B

COURT OF CIVIL APPEALS

Eighth Supreme Judicial District

Messrs. Stubbeman, McRae,
Sealy & Laughlin,
Hon. F. H. Pannill, El Paso, Texas, November 17th., 1965
Attorneys at law,
P. O. Box 670,
Midland, Texas,
Sirs:

You are hereby notified that, in the case of John H. Kelsey, et al., Appellants, Perry H. Corbett, et al., Appellees, vs. our No. 5716, from PECOS County, the following decision and order was this day made and entered by the Court:

The Honorable Court of Civil Appeals today rendered its order overruling appellants' motion for a rehearing. No Opinion.

Respectfully yours
E. J. Redding, Clerk

APPENDIX C

Clerk's Office—Supreme Court

Austin, Texas, February 6, 1966

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of KELSEY, et al. v. CORBETT, et al., No. A-11162,

was this day refused.

Very truly yours,

GEO. TEMPLIN, Clerk

APPENDIX D

Clerk's Office—Supreme Court

Austin, Texas, March 30, 1966

Dear Sir:

You are hereby notified that the Motion for Rehearing in the Case of KELSEY, et al. v. CORBETT, et al., No. A-11162,

was this day overruled.

Very truly yours,

GEO. TEMPLIN, Clerk

APPENDIX E

No. 5716

IN THE COURT OF CIVIL APPEALS
For the Eighth Supreme Judicial District of Texas at El Paso, Texas

JOHN H. KELSEY, et al.,

Appellants,

v.

PERRY H. CORBETT, et al.,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that John H. Kelsey, John M. Hills, William Y. Penn, U. S. M. Oil Company, Joseph I. O'Neill, Jr., Midwest Oil Corporation, W. S. Montgomery, and Atlantic Rich-Field Company (formerly The Atlantic Refining Company), the Appellants in this cause, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, affirming the order of the trial court, entered in this action on October 13, 1965. The Motion For Rehearing was overruled by the Court of Civil Appeals on November 17, 1965; a Writ of Error to the Supreme Court of Texas was refused, no reversible error, on February 16, 1966, and a Motion For Rehearing on the refusal of the Writ of Error was overruled by the Supreme Court of Texas on March 30, 1966.

This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in the said transcript the following:

(1) The transcript of the proceedings in the trial court;

(2) The statement of facts of the proceedings in the trial court;

(3) The opinion of the Court of Civil Appeals and order overruling Motion For Rehearing;

(4) The Application For Writ of Error to the Supreme Court of Texas;

(5) The answer of the Respondents, Corbett and Roy, to the Application For Writ of Error to the Supreme Court of Texas.

(6) The orders of the Supreme Court of Texas refusing Writ of Error and overruling Motion For Rehearing.

III. The following questions are presented by this appeal:

QUESTION ONE

Does the Legislature of Texas have the power by special act passed without notice or hearing, for the sole benefit of a single person, to convert one of its political subdivisions (Pecos County) and its officials into a collection agency for the purpose of collecting from a private citizen a debt allegedly due to another private citizen, without compensation to the public officials or the county, and with no public interest involved, or is such special act void and unenforceable

because in conflict with the Due Process and Equal Protection provisions of the United States Constitution, Amendment Fourteen?

QUESTION TWO

Does the Legislature of Texas have power by special act passed without notice, for the sole benefit of a single person to authorize or require county officials to levy and collect a property tax which exceeds the revenue producing capacity of the property, or is such act void and unenforceable because in conflict with the United States Constitution, Amendment Fourteen?

QUESTION THREE

Does the Legislature of Texas have power by special act passed without notice, for the sole benefit of a single person to authorize or require its officials to levy and collect taxes on property, such collections to be made from citizens who did not own the property during the years for which taxes are collected, or is such special act void and unenforceable because it conflicts with the Due Process and Equal Protection provisions of the United States Constitution, Amendment Fourteen, and the Ex Post Facto provision of Article I, Section 10, of the United States Constitution?

QUESTION FOUR

Does the Legislature of Texas have power by special act passed without notice, for the sole benefit of a single person to authorize or require its officials to levy and collect taxes on property, such collections to be made based on a mineral

value of such land, which value did not exist during the years for which taxes are to be collected, or is such special act void and unenforceable because it conflicts with the Due Process and Equal Protection provisions of the United States Constitution, Amendment Fourteen, and the Ex Post Facto provision of Article I, Section 10, of the United States Constitution?

STUBBEMAN, MCRAE, SEALY & LAUGHLIN,

By .....
F. H. Pannill
Attorneys for Appellants,
P. O. Box 670, Midland, Texas.

PROOF OF SERVICE

I, F. H. PANNILL, one of the attorneys for John H. Kelsey, John M. Hills, William Y. Penn, U. S. M. Oil Company, Joseph I. O'Neill, Jr., Midwest Oil Corporation, W. S. Montgomery, and Atlantic Richfield Company (formerly The Atlantic Refining Company), Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 25th day of June, 1966, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, as follows:

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STUBBEMAN, MCRAE, SEALY &
LAUGHLIN,

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Attorneys for Appellants,
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APPENDIX F

PECOS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 2

CHAPTER 16[14]

H. B. No. 50

An Act ratifying, confirming and validating Pecos County Water Control and Improvement District No. 2 and declaring it to be a validly existing and operating conservation and reclamation district under Section 59, Article 16, Constitution of Texas; ratifying, confirming and validating all governmental proceedings and acts of the Board of Directors, all hearings, notices, elections, bond proceedings, bond, bond sales, tax plan, boundaries, and related matters; providing for incontestability of bonds issued; providing for method, manner and remedy for majority of bondholders where principal or interest on bonds is in default or threatened with default; providing for Commissioners Court to levy and fix tax rate on property in District for payment of bonds or interest; providing for County Tax Assessor and Collector to prepare tax rolls and records, to assess and collect taxes for District; and providing for disposition of money collected; providing for related matters; providing for a severability clause; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Pecos County Water Control and Improvement District No. 2, hereinafter sometimes referred to as "District," in Pecos County, Texas, is hereby in all things ratified, confirmed and validated and is hereby declared to be a validly existing and operating conservation and reclamation district under Section 59, Article 16, of the Constitution of

[14] Vernon's Ann.Civ.St. art. 7880—1 note.

Texas. All governmental proceedings and acts performed by the Board of Directors in connection with the District, all hearings, all notices, all elections, the bond proceedings, all bonds, the sale of the bonds, and all related matters, the ad valorem plan of taxation, and the boundaries of the District are hereby in all things ratified, confirmed and validated, and all bonds issued by the District and approved by the Attorney General of Texas and registered by the Comptroller of Public Accounts, sold and delivered to the purchaser or purchasers thereof, shall be binding, legal, valid and enforceable obligations of said District and shall be incontestable for any cause.

Sec. 2. If at any time said District has outstanding bonds, and there is default or threatened default in the payment of said bonds or interest thereon because of failure to assess, levy or collect taxes for the payment of such bonds or interest thereon, a petition may be filed by a majority of the bondholders of the bonds in default or threatened with default or the authorized agent therefor, and said petition shall be filed with the County Judge of Pecos County for a hearing on the proposition of the Commissioners Court carrying out the taxing functions of the Board of Directors of such District. Upon the filing of such petition, the County Judge shall within thirty (30) days from and after the filing of such petition order a hearing to be held before the Commissioners Court of such County and such hearing to be held within thirty (30) days of the date of such order setting the hearing. Notice of such hearing shall be posted at the courthouse door or at the place normally used for posting legal notices in said

County for at least twenty (20) days prior to said hearing. [At such hearing, if the Commissioners Court determines that there is default or threatened default in the payment of any bonds or interest thereon of said District because of failure to asses, levy or collect taxes for the payment of such bonds or interest thereon, then said Commissioners Court shall and is hereby instructed and authorized to levy and fix a rate of tax on all taxable property in said District on each One Hundred Dollar ($100) valuation on an ad valorem basis sufficient to pay the outstanding bonds and interest thereon when due. The Commissioners Court shall instruct the County Tax Assessor and Collector to prepare the necessary tax rolls and records for the property in the District taken from and identical with the county rolls and values which have been equalized. The County Tax Assessor and Collector shall assess and collect the taxes for said District and shall deposit the money collected less the cost of assessing and collecting such taxes in a special fund entitled "Interest and Sinking Fund" at the bank where such bonds and interest thereon is payable, and such deposit shall be made in ample and sufficient time to allow the paying agent bank to make payment of the principal and interest on such bonds and coupons when same are presented or due to be presented for payment. When such a procedure has been commenced, it shall be the duty of the Commissioners Court of said County to continue to levy and fix the necessary rate of tax on the property in the District and it shall be the duty of the Tax Assessor and Collector of said County to continue to assess and collect such taxes and deposit same as aforementioned until all said bonds and all interest thereon

have been fully and finally paid and said Commissioners Court and said Tax Assessor and Collector are hereby directed and authorized to take whatever actions and procedures necessary to undertake and carry out the levying, fixing of the tax rate, assessing and collecting said taxes and transmitting the money to the paying agent bank.]

Sec. 3. If any section, subsection, paragraph, sentence, clause, phrase or word in this Act, or application thereof to any person or circumstance, is held invalid, such holding shall not affect the validity of the remaining portions of this Act; and the Legislature hereby declares it would have passed such remaining portions despite such invalidity.

Sec. 4. The crowded condition of the Calendars in both Houses of the Legislature and the public importance to the State in expediting the development of conservation projects and facilities within said District, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Passed the House, June 15, 1959, by a viva-voce vote;
passed the Senate, June 16, 1959, by a viva-voce vote.

Approved June 27, 1959.
Effective 90 days after June 16, 1959, date of adjournment.

APPENDIX G

Tax-Free Furor

Land Developers Draw Fire by Selling Public Bonds for Enterprises

Abuses Prompt Some States To Tighten Regulations on Forming Special Districts

'Sticky Fingers & Side Deals'

By DONALD MOFFITT
Staff Reporter of THE WALL STREET JOURNAL

VERONA, Calif.—For years Tom Minatre yearned to turn his 170-acre farm on the Sacramento River near here into a resort subdivision, but a lack of money always stood in the way. But then he hit upon an amazingly simple plan to raise the necessary $550,000.

Mr. Minatre just gathered together five relatives and employes and petitioned the Sutter County supervisors to call a vote on the formation of a new public agency, the Rio Ramaza Community Services District. Since Mr. Minatre and his associates were the only ones eligible to vote, the new special district was unanimously approved, 6-0. The group then elected three of themselves directors and promptly issued and sold $550,000 in tax-free "municipal" bonds.

Today, the money has all been spent—to build a marina on the river bank, to pave streets and to install water and sewer utilities in a "housing tract" on the prairie behind Tom Minatre's homestead. The only thing wrong is that so far not a single lot in the Rio Ramaza has been sold. Partly as a result, the community services district is running in the red and the bond buyers have missed their first two interest payments.

New Law Changes Things

While the way Tom Minatre made use of the bond borrowing powers of a public agency was perfectly legal in times past, he could run into difficulty repeating the procedure today. A new California law, aimed directly at tax districts like Rio Ramaza, permits county officials to halt formation of special districts that don't appear "economically feasible" or likely to benefit the public.

California's crackdown underscores the growing concern over the boom in special district bond borrowing as a way of financing private land development. In riskier cases public officials note, the bonds may go sour and damage investors all over the country.

It isn't just government officials who are worried, either. Many securities dealers fear the marketing of tax-exempt bonds issued by special districts in speculative undertakings could give the whole municipal bond business a black eye. Some have questioned whether the sale of tax-exempts to further private purposes falls wholly within the spirit of the U.S. Constitution, on which the tax exemption of state and local government bonds is based.

"The Power to Destroy"

On the theory that "the power to tax is the power to destroy," the U.S. Supreme Court has developed a doctrine called "reciprocal immunity" that prevents the Federal Government from taxing the states or their "instrumentalities," such as cities, counties and special districts; this doctrine has been interpreted to preclude taxation of the interest the states and these units must pay to raise needed funds.

From time to time, efforts have been made to outlaw the tax exemption and state and city officials fear that special district abuses could give further ammunition to critics, just as has the sale of tax-exempt bonds to finance plants leased to private companies. "We're extremely disturbed over any abuses that could endanger the tax-exempt status of municipals," says Bert A. Betts, California state treasurer.

With this in mind, several states are taking a second look at the rapid proliferation of special districts. Besides California, Texas and Nevada recently have adopted new laws concerning special districts; the legislation enables local government officials to determine whether existing agencies can provide the services proposed by special districts. If so, the officials can refuse to allow the districts to be formed.

SEC Launches Study

Lending some urgency to the state efforts is an investigation being undertaken by the Federal Securities and Exchange Commission, which is casting an eye at the marketing practices by which municipal bond underwriters sell special district issues to investors. Though such bond issues are not required to be registered before public sale, the SEC nonetheless is empowered to investigate and prosecute outright fraud in the sale of any kind of security to the public.

The SEC investigation is centered in California, where special district financing activity is greatest. An SEC spokesman says, "We're interested in cases of possible fraud," though he declines to specify whether the agency has uncovered any.

It's easy to understand the SEC's concern. Bearing tax-exempt interest and official looking names, special district issues appear to be—and frequently, in fact, are—eminently conservative investments. "Even fairly sophisticated investors are going to conclude that the bonds are pretty good," says a well-to-do New York advertising executive who relates that he recently bought seven bonds issued by California special districts. Only after the interest on all went into arrears, he ruefully reports, did he learn that the districts represented "commercial development of land tracts."

Special districts of all kinds are multiplying at an increasing rate. At last count, in 1962, the U.S. Census Bureau numbered 18,323 special districts in the U.S., an increase of 27% from the 14,424 reported in 1957. And there's no evidence the growth has leveled off. California at the end of the 1963 fiscal year listed 3,342 special districts in the state, an increase of 3.2% from the year before, or nearly double the 1.8% rate of growth for the three preceding years.

Special districts vary widely in size and purpose. They may be as large and wealthy as the new San Francisco Bay Area Rapid Transit District, which plans to link three California counties with a modern high-speed

Please Turn to Page 12, Column 1

Tax-Free Furor: Land Developers Draw Fire for Selling Public Bonds

Continued From First Page

rail commuter network, financing the project with $792 million in tax-exempt municipal bonds. Or they may be as tiny as Sheridan Mosquito Abatement District in Placer County, Calif., which has no bonded debt but which collects nearly $500 a year in taxes to rid the tiny Sheridan community of pesky insects.

More often than not, the districts are formed by residents of small unincorporated areas who don't wish to shoulder the tax burdens of full-scale municipal government but nonetheless desire some specific services or facilities, usually water and sewage lines and streets. Current attention, though, is focused on districts formed to help subdividers develop vacant land.

Often Are a Success

Such efforts often are successful. Developer Nathan K. Mendelsohn, for example, wanted to create a town called California City on 100,000 acres of Southern California's Mojave Desert. Nine residents of the region obligingly petitioned Kern County supervisors to call an election to form a special district and the proposal sailed through, 12-0.

Since then, the district has sold $3.2 million of tax-free bonds to build a golf course, a swimming pool and to put in streets and utilities. The area's population has grown from 90 four years ago to some 800 today, though this is still a long way from the 100,000 expected enventually by Mr. Mendelsohn. The growth has been steady enough that interest payments on the bonds have been made on time.

But Mr. Minatre's experience illustrates the pitfalls bond buyers in some other projects may risk. Rio Ramaza boasts a $130,000 marina, complete with gear for launching boats from the steep river bank. Mr. Minatre, its proprietor, has a 50-year lease on it for 6% of gross receipts, no matter how large or small. This grizzled, 64-year old former county fair candy vender negotiated the deal with the district's three directors—his son, his housekeeper and himself.

"Will Be Worth Millions"

"They tell me, sir, that these are the finest boat docks in the United States," he declares. "This place is going to be worth millions, sir."

But across the nearby road, where scraggly chickens scratch the dust amidst broken-down farm equipment and rusting autos, the picture seems less promising. True, hidden in high prairie grass, there's a 123-lot subdivision, complete with pavements, street markers and fire hydrants. But so far there are no new houses—and so far there's been no interest payment for the bondholders.

If the worst comes, the bondholders can foreclose—though that step is a slow and costly expedient. Usually the bonds represent a first lien on the land under the district's jurisdiction. Investors can ask county officials to take over and sell it if there is a default. Even so, the bondholders might sometimes wind up with nothing—the prospect faced by bond owners of a special district near Marysville, Calif.

Trouble at Country Club Park

A speculative subdivision there called Country Club Park sold $680,686 worth of tax-free bonds to finance utilities. But the project went broke before work was finished and bondholders tried to foreclose. To their surprise, they discovered investors who owned mortgages on the land itself had first claim on the property.

A Federal bankruptcy judge found so many violations of laws governing special district formation and financing that he ruled both the district and its bonds invalid. The mortgage holders then could seize the land, he decreed. The district's history was "a [illegible] of greased palms, sticky fingers, side deals, and secret profits, misfeasance, nonfeasance and malfeasance, diversion of funds and failure to comply with statuatory requirements . . .," his ruling said.

California already has sealed some loopholes in special district laws. New statutes require organizations to file annual financial reports with the state auditor and developers must now post performance bonds to guarantee the money is used properly. And there are strong indications that more restrictions lie ahead. Gov. Edmund G. Brown in his opening message to the state legislature this month urged the lawmakers to move to prevent abuses of special district laws by speculators who use them to develop financially unsound subdivisions at the expense of both bond purchaser and homeowner."

The governor didn't detail what sort of legislation he wanted but there's speculation that the state may soon establish special district debt limits as well as bring the districts under control of a state regulatory agency.

APPENDIX H

FRANK STUBBEMAN
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BOYD LAUGHLIN
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WM. B. BROWDER, JR.
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ATTORNEYS AT LAW
MIDLAND SAVINGS BUILDING
MIDLAND, TEXAS

AREA CODE 915
MUTUAL 2-1616
P. O. BOX 670

August 18, 1966

Director of Internal Revenue
Dallas, Texas

Dear Sir:

We are perfecting an appeal to the United States Supreme Court in a case of Kelsey v. Corbett.

One of the issues in this case was whether certain obligations in the form of municipal bonds were actually private obligations so that the proceeds of these bonds would constitute ordinary income subject to tax, and not municipal obligations exempt from income tax under Section 103 of the Internal Revenue Code.

We hand you herewith a copy of our Jurisdiction Statement in which this matter is discussed. We thought you might be interested in the fact that this question is being raised in the court , and perhaps you would want to hand this to your legal counsel for his attention.

Very truly yours,

STUBBEMAN, McRAE, SEALY & LAUGHLIN

By:
F. H. Pannill

FHP:abh

Enclosure

cc: Mr. Connell Ashley
Mr. Paul H. Dionne
Mr. Robert B. Cox

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JOHN F. DAVIS, CLERK

Docket No. 475

In the

Supreme Court of the United States

OCTOBER TERM, 1966

JOHN H. KELSEY, et al.,

Appellants,

v.

PERRY H. CORBETT, et al.,

Appellees.

On Appeal from the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

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Article 9.36, Election Code of the State of Texas, Vernon's Ann. Tex. Stat. 15

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Appellants,

v.

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Appellees.

On Appeal from the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

To Said Honorable Court:

Appellees Perry H. Corbett and J. Folse Roy, real parties in interest, respectfully move to dismiss this appeal or affirm the judgment below on the grounds (a) that the federal questions sought to be reviewed were not timely and properly raised or preserved in the courts below; (b) that the federal questions sought to be reviewed were not expressly passed on in the courts below, the judgment rendered in the said Court of Civil Appeals being solely and

expressly based on adequate non-federal law; and (c) that if a federal question is properly before this court, it is not substantial, is the basis for no real controversy and is frivolous.

STATEMENT

The facts are so argumentative and abbreviated in Appellants' Statement of Jurisdiction that we respectfully beg this Court's indulgence if more space is taken in the factual presentation than would ordinarily be necessary. The facts in this case as here presented are without dispute in the record and are outlined chronologically as follows:

1. In this case we are concerned originally with a tract of land, some of which is mineral classified insofar as the ownership of minerals is concerned and some of which is not so classified, consisting of a total of 8,540 acres, located in Pecos County, Texas, and being located geographically in the Arrid Region of West Texas, lying north of the City of Fort Stockton, which is the County Seat of Pecos County, Texas, and which land is referred to as being two ranches, being the Santa Rosa Ranch and the Imperial Ranch (see Statement of Facts, pp. 302-309, R.... for exact legal description and exact location of property involved).

2. On April 11, 1955, a petition was filed with the County Judge and Commissioners' Court of Pecos County, Texas, covering the tracts of land involved to form a water control and improvement district, which was to be known as "Pecos County Water Control and Improvement District Number 2." The petition was filed by a corporation with a permit

to do business in Texas known as St. Michael's College Foundation, Inc. and three private individuals. It is stated in the application, and has not been disputed in the record, that these signers owned the majority interest in the property to be affected by the proposed water district (See Statement of Facts, pp. 52-81, R. ....).

3. After the Application to form the district was filed, the County Judge of Pecos County, Texas, set down the date for hearing of such application and notice thereof was duly posted of the proposed hearing for the formation of the district at the Courthouse door in Fort Stockton and elsewhere as required by law; further, such notice was duly published in the Fort Stockton newspaper, which was the only county newspaper in the county seat of Pecos County, of such proposed hearing (Statement of Facts, pp. 311-334, R. ....).

4. A hearing was held before the Commissioners' Court of Pecos County, Texas, all members thereof being present, on May 9, 1955, and at such hearing the Commissioners' Court, after a full and complete hearing, unanimously approved the creation and establishment of the district (Statement of Facts, pp. 334-345, 359 R. ....).

5. In view of the fact that the proceedings in question transpired over eleven years ago, it is worthwhile to consider the areas in question, and the views of all persons who testified at the trial of this case as to the status of the areas here concerned during the years 1955 and 1956, which was as follows:

A. The witness Paul Bleakley stated that in 1955 the Santa Rosa Ranch had a spring producing 4,500 gallons

of water a minute, had a 60 to 80 acre lake with fish in it, had cottonwood trees and a pear orchard, had a fairly complete canal system for water irrigation; that 1,500 acres were in cultivation and irrigation and that there were several wells; that the Imperial Ranch was irrigated in large part, that there were at least three producing water wells on it, that 900 or 1,000 acres were in cultivation and under irrigation, and that he thought further water well drilling operations would be very feasible and, in his words, the area would be a "flowerland". (Statement of Facts, pp. 101-130, R. ....).

B. The appellant William Penn testified that in drilling an oil well prior to the formation of the district, he hit water at approximately 2,000 feet; that the water flowed so strongly out of the well that it flowed some 10 to 12 feet above the casing into the air. (Statement of Facts, pp. 153, R. ....). It was what he termed a "big artesian well". He further testified he thought there was other water in the area in the same formation, (Statement of Facts, p. 153, R. ....); that such was good irrigation water (Statement of Facts, p. 155, R. ....); that he thought the Santa Rosa Ranch was definitely a "likely area for the development of water for irrigation purposes" (Statement of Facts, p. 156, R. ....); and that he thought the district was a feasible operation. He further testified that water was necessary for the development of the mineral estate, insofar as initial drilling was concerned, would be beneficial to the mineral estate and was also necessary for secondary recovery operations or water flooding operations. The testimony of Appellant Penn, who is a consulting geoogist and oil producer, is so beneficial to the Appellees' position that his entire testimony is respectfully referred to this Court. (Penn was the only Appellant who expressed any familiarity at all with the land in question.)

C. The Appellants' witness P. R. Schlagel, Tax Collector for Pecos County, testified that when dry land becomes irrigated land through production of water in sufficient quantities, that its value automatically in-

creases from $10.00 an acre land to $300.00 an acre land, and that it was not unusual for bonded indebtedness to be created for the purpose of constructing improvements on the property covered by a particular governmental agency, including a water district (Statement of Facts, pp. 247, 248, 233, R. ....).

D. The Appellants' witness Leslie Bowman testified that he had been County Commissioner in Pecos County since 1949, was a farmer by trade, and owned and rented farm land immediately adjacent to the areas involved. Bowman testified that he was a member of the Commissioners' Court and was present when the application to form the water district was presented to the Court. Commissioner Bowman voted in favor of the formation of the district, as did all other Commissioners (Statement of Facts, pp. 249, 250, 254, 257, 259, R. ....).

The above evidence stated by the aforementioned witnesses, all of whom were called to the stand by Appellants, was without contradiction and shows (1) that the total area in question had approximately 2,500 acres in cultivation and under irrigation; (2) that the property in question had a lake thereon between 60 and 80 acres in size, flowing wells, pumping wells and a fairly complete canal and irrigation system; (3) that the area in question had a large cotton allotment allocation during the period of 1955 and 1956; (4) that the property in question that was not in cultivation would have been increased in value from $10.00 or $12.00 land to $300.00 land if there was an adequate water supply for the entire 8,540 acres involved; (5) that water is a necessary ingredient not only for surface agricultural development, but also for mineral development and for water flooding or secondary recovery development; and (6) that

all parties considered the plan of operation feasible, beneficial and useful. It is clear from a reading of the record herein and from testimony adduced at the trial of this case that at the time of the formation and inception of the water district it was considered by all familiar with the property involved to be entirely proper and feasible.

6. The Pecos County Water Control and Improvement District Number 2 was confirmed on July 24, 1955 at a meeting of the Board of Directors, and the election for the purpose of voting upon the confirmation of the organization of the District was held on June 18, 1955 (Statement of Facts, pp. 345-349, R. ....). An order was adopted by the Water District setting a date for an exclusion of lands hearing for August 15, 1955 (Statement of Facts, pp. 349-352, R. ....). The hearing was duly held on the exclusion of lands on August 15, 1955, at which no requests for exclusion were presented by anyone (Statement of Facts, pp. 359-364, R. ....). On August 15, 1955, an election was ordered for September 24, 1955, and in such election a bond issue was duly voted on and passed, authorizing the issuance of $850,000 in bonds, of which $180,000 were issued. It is obvious from the record in this case that the various matters above referred to appeared at length in the Fort Stockton Pioneer, a newspaper published in Pecos County; that such notifications were also done by posting, as required by law, by the Sheriff of Pecos County, Texas; and that all matters were timely attended to, in proper form, and properly passed or approved by the proper authority. As a mat-

ter of fact, Appellants do not argue or suggest that elections were not held; do not argue or suggest that living people did not vote in the elections; do not argue or suggest that the votes were not properly counted and tabulated; and do not argue or suggest that the voters did not then own taxable property within the area under consideration or that the voters were not residents of Pecos County, Texas.

7. The directors' bonds for the water district were duly filed with the County Clerk of Pecos County, Texas (Statement of Facts, pp. 393-437, R. ....). On January 20, William Guyton, a noted hydrologist of Austin, Texas, and Marvin Turner Engineers of the same city, filed a detailed report with the Board of Water Engineers of the State of Texas, giving a comprehensive and detailed plan of future development of the water district with the intial bond issue to be in the amount of $180,000, to be followed by proposed later issues, and on February 3, 1956, the Board of Water Engineers of the State of Texas approved such project and the issuance of the bonds. (Statement of Facts, pp. 473, 474, R. ....).

8. On February 8, 1956, the Attorney General of Texas, John Ben Shepard, acting for his office and the State of Texas, specifically found all requirements of the law complied with in connection with the issuance of said bonds, and found that there had been strict compliance with the Constitution and laws of the State of Texas in connection therewith. In this connection, as shown on page 15 of the Statement of Jurisdiction, appearing in the second paragraph of the Opinion of the Court of Civil Appeals is the

following language: " * * * and it is conceded by all parties that all proceedings relating to the formation of such district and the approval of its bonds are on their face letter-perfect."

9. On February 9, 1956, James P. Gibson, a practicing and licensed bond attorney of Austin, Texas, certified that the bonds in question were good and merchantable, and could be freely dealt with in the channels of commerce. (Statement of Facts, p. 503, R. ....).

10. The record shows that the sum of $163,215 was received by the District for the sale of its bonds, and that it was spent as follows (Statement of Facts, pp. 105, 109, 110, 120, 121, 138, 111, 113, R. ....):

Marvin Turner Engineers (Engineering report by William F. Guyton)	$ 5,640.00
W. L. Norman dba Norman Texas Company (for handling the bond issue)	8,350.00
J. R. Johnson (for drilling the dry water well to 4,600 feet)	47,000.00
The Steck Company (for printing)	$ 247.00
Gibson, Spence & Gibson (for attorney's fees in connection with the creation of the District and the bond issuance)	2,727.00
Western Company	1,772.34
Interest and sinking fund on deposit in American National Bank	16,200.00
St. Michael's College Foundation (purchase of three artesian wells, irrigation canals, etc.)	75,000.00

Arnold and Crane purchased the bonds and sold them to Appellee Perry Corbett for $174,041.92, in cash, which was between 94% and 97% of par value, and Appellee Corbett subsequently sold them to Appellee Roy for 100% of par value, being $194,222.50 (Statement of Facts, p. 479, R. ...). It is submitted that the money and funds were properly spent, and that had the well drilled not been dry the irrigation project would have, as anticipated, been entirely feasible. After the initial well was unsuccessful no further wells were thereafter drilled. It is so obvious that it need only be casually mentioned that Appellees Corbett and Roy had no control or authority over how the money was spent, but that in fact Roy's obligation was to Appellee Corbett and Corbett's obligation and payment was to Arnold and Crane, licensed and reputable bond brokers of New Orleans, Louisiana. (Appellants have not even appealed from the order of the trial court dismissing Arnold and Crane from this suit.) In this connection, Arnold and Crane paid their consideration to Norman Texas Company who handled the placing and handling of the bond issue. In other words, the factual background shows clearly that after all State agencies had approved the bond issue as required by law and after the bond attorney had certified the validity of the bonds, the bonds were sold by the bonding agent to Arnold and Crane, who sold same to Appellee Corbett, who sold same to Appellee Roy, who presently holds the bonds, having paid full value for same without discount.

11. On May 31, 1957, a General Validating Act (Article 7880-147c10, Vernon's Ann. Tex. Stat.) was passed by

the Legislature of Texas approving and ratifying all water districts in this State and the bonds theretofore issued by such water district. This particular Validating Act would have covered the transaction now in issue in point of time, and has not been attacked by Appellants at any time.

12. On June 16, 1959, a Special Validating Act (H.B. 50) was passed by the Texas Legislature specifically confirming the water district in all things and validating all bonds issued by it. (Jur. Stat., pp. 33-36) This Special Validating Act has been attacked in this Honorable Court even though no mention thereof was made in the Opinion of the Court of Civil Appeals, which appears on pages 13 through 19 of the Statement of Jurisdiction filed herein. In this connection, there is no showing in the record herein by Appellants as to what notice was given as to such proposed bill or as to the legislative process by which this bill, or any other bill, passes through the two houses of the Texas Legislature and becomes a part of the law of Texas. Further, the debt or lien created by the passage and approval of the bonded indebtedness became in existence when the bonds were placed in the channels of commerce and were thereafter purchased for full value by Appellees herein as fully shown in the aforementioned factual statement.

It is apparent, therefore, that the creation of the Water District and the issuance of its bonds have been approved by various State agencies, including the Commissioners' Court of Pecos County, Texas, the Texas State Board of Water Engineers, the Attorney General of Texas, and the office of the State Comptroller. The validity of the bonds

was further stated in an opinion written by Attorney James Gibson, a reputable bond attorney of Austin, Texas, and that same met all legal and constitutional requirements to be valid obligations of the District, and enforceable in all things by the levy of taxes. In bringing this suit Appellants have, in effect, charged the Commissioners' Court of Pecos County, Texas, and all other State agencies above referred to, as well as the law firm of Gibson, Spence & Gibson, of ineptitude and incompetence, if not something worse. There is no question in the record but what Perry Corbett and later J. Folse Roy purchased such bonds of the District in all good faith and for a valuable consideration consisting of 100% of par value. Similarly, there is no testimony that Paul Bleakley, Brother Benildus or any other person instrumental or concerned in the creation of the District had ever met or known Appellees Corbett or Roy at any time, or that any other party to this suit other than Arnold and Crane, investment brokers, had ever known either of such Appellees Corbett or Roy up to and including the time of trial (Statement of Facts, p. 131, R. ....).

13. Appellants admit in their Statement of Jurisdiction that all of them acquired their interests after the formation of this District, and they therefore had constructive, if not actual notice of these facts. (Jur. Stat., p. 6) Appellant Edward Dickinson testified that all oil and/or gas wells drilled on the premises were drilled subsequent to 1961. (Statement of Facts, p. 8, R. ....). As testified to by J. L. Irish, an abstracter, with Elliott & Waldron Abstract Company in Fort Stockton, Texas, the abstracts prepared for

various Appellants in this case contained many documents relating to the District, such being as follows, (Statement of Facts, pp. 300, 301, 352, 353, 355):

A. Petition for Water Control & Improvement District;

B. Order Setting Petition Down for Hearing;

C. Notice of Hearing on Petition;

D. Affidavit;

E. Order Upon Hearing, Granting Petition and Appointing Directors;

F. Order Confirming Organization of District;

G. Certified Copy of Order;

H. Certified Copy of Order setting boundaries after exclusion hearing.

Likewise, the evidence is very clear that in at least some of the abstracter's certification pages at the back of such abstracts, that the tax collector, as well as the abstracters, expressly said the property was located in other taxing districts including * * * "Pecos County Water Control and Improvement District No. 2", clearly imparting notice to Appellants (Statement of Facts, pp. 387, 388, R. ....).

14. This suit was initially instituted by Appellants in the 112th Judicial District Court of Pecos County, Texas, in the year 1961, and as shown in the transcript of the pleadings a number of special defenses were pled by Appellees herein. Prior to the announcement by Appellants herein for the trial of this case, the Appellants voluntarily dismissed with prejudice any "claim or cause of action * * * based upon or in any way related to" the alleged facts that * * * "there

were no inhabitants of the supposed water district; that the district was a sham or subterfuge created for anybody's private benefit; and/or that Appellees had any actual and constructive notice of such supposed facts, even if true" (See Dismissal Order, Tr. pp. 76-77, R. ....). In other words the Appellants herein prayed (Tr. p. 17, R. ....) for a declaratory judgment in general terms, later filed an amended pleading, (Tr. p. 42, R. ....), and thereafter (Tr. p. 76, R. ....), dismissed their suit with prejudice with the exception of the declaratory judgment feature, and it was on this general pleading that Appellants then proceeded to trial. The Court is respectfully referred to the matters which were dismissed with prejudice by the Appellants herein. After the conclusion of all the evidence the Trial Court then ruled in favor of the Appellees herein, which action, as shown by the exhibits attached to Appellants' Statement of Jurisdiction, has been subsequently upheld.

ARGUMENT

I. Federal questions were not property raised.

Contrary to Appellants' assertion on page 7 of their Statement of Jurisdiction, the federal questions sought to be reviewed here were not even raised until *after* the case had been fully tried on the pleadings in the trial court. (See Plaintiff's Second Amended Original Petition, R. ....., upon which Appellants went to trial.) In paragraph 18 of Appellants' Motion for New Trial, (Tr. 124, 125 R. .....) almost as an after thought, Appellants did for the first time even mention the U. S. Constitution, and yet, even there, no mention was made of the special validating statute (H.B. 50)

Acts 1959, 56th Legis. 1st called session p. 59 ch. 16 now so vehemently attacked. Likewise, when Appellees tendered this special statute into evidence in the trial court, Appellants did make objections thereto, but *not* on any federal or U. S. Constitutional basis. (Statement of Facts, pp. 95-96; 294, R. .....). Even in their Brief of Appellants in the Court of Civil Appeals, no Point of Error was presented which contended that such H.B. 50 (Jur. Stat. Appendix F) was in any way contrary to the U. S. Constitution. Under settled Texas procedural law a contention not presented to an Appellate Court in a Point of Error is waived. *Rule 418, Tex. Rules of Civil Proc.; King v. Cron*, 285 S.W. 2d 833 (Tex. Civ. App. 1955), Ref. N.R.E., Cert. denied 352 U.S. 843, 77 S. Ct. 67; *Futch v. Greer*, 353 S.W. 2d 898 (Tex. Civ. App.) Ref. N.R.E., Cert. denied 372 U.S. 913, 83 S. Ct. 728. The most that can be said of the Brief of Appellants in this regard is that on pp. 25-26 and 72-73 thereof there is very briefly presented a contention that the creation of the water district, the issuance of its bonds, and the levy of taxes to pay the bonds constituted a taxing of private property in violation of due process of law under the Texas Constitution. Of course other statutes and Texas constitutional provisions also governed these matters; i.e., *Article XVI. §59, Texas Constitution; Articles 7880-1 et seq., Article 7880-147c10*, Vernon's Ann. Tex. Stat., the validity of none of which have been attacked in this Court or at anytime in the courts below. It is no wonder why the Court of Civil Appeals did not expressly pass upon the "validity", under the U.S. Constitution, of H.B. 50—it was not asked to. To further demonstrate

how Appellants have belatedly changed their theories in this case one need only read pp. 56-57 of the Brief of Appellants in the Court of Civil Appeals, (R. .....), where they said:

> "On these considerations, Appellants state that the attempted validating act (Defendants' Exhibit No. 2) has no effect one way or the other on the outcome of this case."

Appellants have not met this honorable Court's test that it is essential to its jurisdiction on appeal "that there be an explicit and timely insistance in the courts that a state statute, as applied, is repugnant to the federal constitution, treaties or laws". *Raley v. Ohio*, 360 U.S. 423, 3 L. Ed. 2d 1344, 79 S. Ct. 1257.

II. No federal question was passed on, the decision by the Court of Civil Appeals being based on adequate non-federal grounds.

As is clear from a reading of the opinion by the Court of Civil Appeals in this case, (Jur. Stat., Appendix A), its decision is based on the long settled Texas law (1) That Article 9.36 of the Election Code of the State of Texas, Vernon's Ann. Tex. Stat., makes valid and binding on the courts the "conclusively presumed" results of an election unless an election contest is promptly filed according to statutory law, and (2) that only the State can attack the existence of the water district after it has operated under the statutory formation proceedings, (which all parties admit are regular and letter-perfect). It should be parenthetically added that the Appellants asked the Attorney General of Texas to file such a suit for the Appellants, but he refused.

(Plaintiff's Original Petition, paragraph IX, R. .....). Of course basis (1), supra, is basic to any political entity's having elections ever become final, to insure sound and well-ordered government. Basis (2), supra, is also obviously designed to protect innocent persons who have dealt with municipal corporations which are ostensibly acting lawfully. There were also numerous other adequate state rules of law of a defensive nature which were presented by Appellees to the Court of Civil Appeals, and which would have each been a sufficient basis for its decision. That Court, however, did not pass on or discuss them, as it obviously felt the stated grounds upon which it did base its decision alone compelled the affirmance of the trial courts' decision. These additional grounds of state law, which were thoroughly briefed in the Court of Civil Appeals, (Brief of Appellees Corbett and Roy, pp. 19-36, R. .....), are as follows: (a) Statutory incontestability of bonds—Article 7880-34, Vernon's Ann. Texas Statutes; (b) No exclusion of Appellants' property from the District was sought as provided for in Article 7880-76, Vernon's Ann. Texas Statutes; (c) Appellants' suit is an unlawful collateral attack on the District and the tax levy; (d) The doctrine of Estoppel by Recital; (e) The bar of the statutes of limitations, laches and stale demand to Appellants' suit.

There was simply no federal question passed on or involved in the Court of Civil Appeals decision or opinion, and none was essential to its judgment. And, since *Murdock v.*

City of Memphis, 87 U.S. 590 (1875), this Court has refused to review state court decisions if there are independent and adequate state grounds to support its decision.

As to "question" (4) asserted by Appellants on p. 4 of their Statement of Jurisdiction, this case has absolutely nothing to do with the Internal Revenue Service or the U. S. income tax laws. To desperately go outside the record and attempt to raise, for the first time in this Court, a jurisdictional federal question relating to income tax law is not only inexcusable, it is so irrelevant to the issues of this case that it needs no answer. Even Appellants' own Notice of Appeal contains no reference to any income tax question, and Rule 10 of the rules of this honorable Court bars any consideration of such an issue, even if it were otherwise in the case, which it is not. To invite "Amicus Curiae" assistance from the Treasury Department on issues not before this Court (Jur. Stat., Appendix H) does a disservice to the Government and the judicial process. The Wall Street Journal article (Jur. Stat., Appendix G) is also totally irrelevant to the case at bar, and has nothing to do with this Court's jurisdiction or lack thereof of this case. It is unbelievable that Appellants would go so far outside the record to create a "scandal".

III. Any federal question is not substantial.

As Appellees have attempted to demonstrate herein, there is no federal question now before this honorable Court of

any kind. However, if this Court considers that there is, Appellees would point out that such is unsubstantial, is frivolous, and is contrary to the spirit of decisions of this honorable Court. As shown above, we contend, and Appellants have admitted, that the validity of H.B. 50 has "no effect one way or the other on the outcome of this case". It would seem, under Appellants' Jurisdictional Statement, that the most "relief" this Court could give Appellants would be to strike down H.B. 50 as in violation of the Fourteenth Amendment to the U. S. Constitution. Would this also invalidate the creation of the water district, the issuance of its bonds or Appellees Corbett and Roy's right to have taxes paid to pay off the bonds, of which Appellants so bitterly but unjustifiedly complain? We submit clearly not, and this is exactly what has been held by the Court of Civil Appeals, on well settled non-federal grounds. The protection of innocent municipal bond purchases has also been the policy of this honorable Court for more than 100 years. *Bissell v. City of Jeffersonville*, 24 How. 298, 16 L. Ed. 664 (1861); *Kennicott v. Supervisors*, 83 U.S. 452, 21 L. Ed. 319 (1872); *Town of Coloma v. Eaves*, 92 U.S. 484, 23 L. Ed. 579 (1876).

CONCLUSION

It is perhaps a rare case in which so many requisites of Supreme Court jurisdiction have not been met by an Appellant or Appellants. Nevertheless, we submit such in the case at bar, and for the foregoing reasons it is respectfully

submitted that this appeal should be dismissed, or the decision of the Court of Civil Appeals be affirmed, for which Appellees pray.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion to Dismiss or Affirm has been deposited in a United States mail box, with air mail postage prepaid, addressed to counsel of record of the adverse parties at their post office address as follows:

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Mr. F. H. Pannill
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